IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: 21.2.2007.

Balbir Singh Vs. State of Punjab

CORAM: Hon'ble Mr. Justice Virender Singh

Present: Mr. Navdeep Singh, Advocate, for the appellant.
Mr. B.S. Sewak, DAG, Punjab.

Virender Singh, J.

Balbir Singh, the appellant herein stands convicted vide impugned judgment of learned Judge, Special Court, Jalandhar dated 22.2.2002 under Section 15 of Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act'), for allegedly keeping in his conscious possession 60 Kgs of poppy heads without any permit or licence and has been sentenced to undergo R.I. for ten years and to pay a fine of Rs.1,00,000/-, in default thereof to further undergo R.I. for two years.

In short, the case of the prosecution is that on 10.5.1996, a police party headed by S.I. Harjinder Singh of Police Station Bhogpur (PW1) alongwith other police officials was going for patrolling and checking and when he reached at T. Point in the area of Pachranga, he received a secret information that the appellant was in the habit of selling poppy heads and he could be apprehended. He

joined Kulbir Singh alias Rana, resident of Talwandi Abdar in the police party and conducted a raid in the fields of sun flowers (Surajmukhi) in the area of village Shakarpur. The appellant was found sitting on the bags of poppy heads and on seeing the police party he made an attempt to run away. He was, however, apprehended at the spot. After he disclosed his identity, a notice in writing was given to him under Section 50 of the Act and inspite of the fact that he opted to be searched by aforesaid Harjinder Singh, the Investigating officer, DSP Rajinder Singh (PW4) was called at the spot. In his presence the bags were searched which were containing poppy heads. 250 grams of poppy heads was extracted as sample from each of the gunny bags and on weighment each bag was containing 29 Kgs. 750 grams of poppy heads. Two samples and two gunny bags containing the remainder were sealed with the seal of DSP Rajinder Singh having inscription 'RS'. The same was handed over to Kulbir Singh. The entire case property was taken into possession vide recovery memo signed by DSP Rajinder Singh and the aforesaid PW Kulbir Singh. Ruqa was sent on the basis of which formal FIR was recorded. Rough site plan was prepared at the spot. On the next day the accused and the case property was produced before the Ilaqa Magistrate. The Ilaqa Magistrate checked the case property. Thereafter, the same was deposited with MHC Bhupender Singh. After the receipt of the report of Chemical Examiner, the

investigation was completed and challan was submitted against the appellant. He was charged under Section 15 of the Act by the learned trial Court.

In order to prove the charge, prosecution has examined SI Harjinder Singh (PW1), the Investigating Officer of this case. The investigation conducted by him has been alluded to in the preceding paras. Constable Bhupinder Singh (PW2) had tendered his affidavit Ex.PW2/A to prove the link evidence as he was posted as MHC in Police Station Bhogpur. Constable Pavittar Singh (PW3) had also tendered his affidavit Ex.PW3/A to prove the link evidence as he had taken the samples to the Chemical Examiner. DSP Rajinder Singh (PW4) is a witness to the recovery. ASI Sucha Singh (PW5) is another witness to the recovery. He had also signed certain memos at the spot.

Kulbir Singh, the aforesaid who was joined as an independent witness, was given up as having been won over by the accused. Chemical Examiner's report was also tendered.

The plea taken by the appellant as emerges from his statement recorded under Section 313 Cr.P.C. was of false implication alleging that no recovery was effected from him and he, in fact, on 10.5.1996 had gone to the house of his maternal aunt (Mammi) in connection with her daughter's marriage. He was lifted from there and falsely implicated in this case. However, the appellant had not

produced any evidence in defence.

After appreciating the entire evidence, the appellant was convicted and sentenced by the learned trial Court as indicated herein above. Hence this appeal.

I have heard Mr. Navdeep Singh, learned counsel for the appellant and Mr. B.S. Sewak, DAG, Punjab. With their assistance I have gone through the entire records.

Mr. Navdeep Singh attacks the case of the prosecution primarily on the issue of conscious possession of the contraband qua the appellant submitting that the recovery of two bags of poppy heads was allegedly effected from a place which was accessible to all and sundry. Simply that the appellant was found to be sitting on the bags, his conscious possession qua the contraband is not proved. Admittedly, the appellant was resident of village Dinewal Khurd, Police Station Garhshanker. He is shown to be a labourer as is clear from the title of the judgment. The recovery was effected in the fields of sunflowers in the area of village Shakarpur. The fields of recovery did not belong to the appellant. The prosecution has also not brought on record any connection of the appellant with that village. Therefore, in all fairness the police should have conducted further investigation by probing deep into the matter especially with regard to the transportation of the two bags to the place of incident, ownership of the poppy heads etc. to prove that the appellant was really in

possession of the said articles. Once the said exercise is not done in the case in hand, it can comfortably be said that the prosecution has not been able to prove the conscious possession of the contraband qua the appellant.

In support of his contentions Mr. Singh relies upon a judgment of Hon'ble Apex Court rendered in **State of Punjab vs. Balkar Singh and another, 2004 (3) SCC 582** and another judgment of this Court rendered in **Baldev Singh vs. State of Punjab, 2005 (1) RCR 823**.

Mr. Singh then submits that otherwise also, in the light of Full Bench decision of this Court rendered in **Kashmir Singh vs. State of Punjab, 2006 (2) RCR (Criminal) 477**, the presumption of the conscious possession qua the appellant under Sections 35 and 54 of the Act cannot be drawn as no specific question with regard to the conscious possession was put to him in his statement recorded under Section 313 Cr.P.C. Strengthening his arguments on this aspect, the learned counsel also relies upon a latest judgment of this Court rendered in **Sukhdev Singh and another Vs. State of Punjab, 2006 (4) RCR (Crl.) 263**.

Mr. Singh has also made an attempt to dent the case of the prosecution with regard to the link evidence submitting that neither Form No.29 was prepared at the spot nor the same was deposited with MHC as is clear from the statement of official

witnesses. This is considered to be a serious flaw by this Court and to strengthen his view point, he relies upon a judgment of this Court rendered in **Bhola Singh Vs. State of Punjab, 2005 (2) RCR (Crl.) 520**.

Mr. Singh lastly points out certain discrepancies in the statements of the prosecution witnesses, but primarily he sets score by the aforesaid weaknesses pointed out in the case of the prosecution.

Rebutting the arguments advanced by Mr. Navdeep Singh, Mr. Sewak, the learned State counsel submits that the recovery from the appellant is effected in the presence of DSP and there is no reason to disbelieve the official witnesses who had no axe to grind against him. May be the independent witness had not been produced by the prosecution, still the recovery is proved from the other material on record. On the point of link evidence, the learned State counsel submits that may be Form No.29 was not prepared at the spot but the case property was produced before the Ilaqa Magistrate on the following day and he had verified all the facts and, therefore, the said lacuna would be of no help to the appellant. On the basis of the aforesaid submissions, the learned State counsel prays for affirming the conviction and the sentence.

After hearing learned counsel for the either side and going through the records minutely, I am of the considered view that the prosecution has not been able to prove its case against the

appellant beyond all shadow of reasonable doubt and as such he deserves to be acquitted. I shall now be entering into a detailed discussion for arriving at the said conclusion.

It goes without saying that possession is the core ingredient to be established before the accused is submitted to the punishment under the Act and, therefore, the prosecution has to prove the nexus between the accused and the contraband allegedly recovered, as held by their Lordships of the Hon'ble Supreme Court in **Avtar Singh Vs. State of Punjab, 2002 (4) RCR (Crl.) 180** wherein it is held that the word 'possession', no doubt has different shades of meaning and is quite elastic in its connotation. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the contraband.

What has to be appreciated in the case in hand is as to whether the prosecution has been able to prove the required intention or knowledge of the accused qua the contraband so as to draw a presumption under Section 35 of the Act against him. The conceded position is that the appellant was not put any specific question in his statement recorded under Section 313 Cr.P.C. In the light of Full Bench decision of this Court rendered in **Kashmir Singh's case (supra)**, no presumption against him under Sections 35 and 54 of the Act can be drawn. In this eventuality the other set of evidence

produced before the Court for proving the conscious possession has to be appreciated in its right perspective.

As is clear from the records that the appellant was a labourer and resident of a different village. The case is set up on the basis of a secret information to the effect that he was selling poppy heads at a particular point. The secret information cannot be made the basis of the conviction. Therefore, it was the duty of the prosecution to prove the intelligent/conscious possession of the contraband qua the appellant. Merely because the appellant was found sitting on the bags or near the bags cannot be said to be a proof enough of conscious possession of the contraband. In **Balkar Singh's case (supra)** relied upon by Mr. Navdeep Singh, their Lordships of Hon'ble Apex Court while acquitting the appellant in a case of alleged recovery of 100 bags of poppy husk observed that merely because the appellants were found present near the bags or sitting near the bags or failure to give any satisfactory explanation for being so present there, could not be taken against them so as to infer that the conscious possession was proved. In the aforesaid case also the appellants were of some other place and it was held that in all fairness the police should have conducted further investigation as to the transportation of contraband to the place of incident, ownership thereof to prove that the accused were really in possession of the article (contraband). In the case in hand, factually the same is the

position. The cross-examination of the Investigating Officer rather demolishes the case of the prosecution to a great extent. He stated that the recovery was effected from the fields of Mehar Singh. The appellant had no connection with Mehar Singh. Mehar Singh was not joined in the investigation. The Investigating Officer further stated that the village from where the recovery was effected fell within the jurisdiction of Hoshiarpur. The present case is registered in Police Station Bhogpur. All these facts are enough to conclude that the prosecution has not been able to prove the conscious possession of the contraband qua the appellant and the judgment rendered in **Balkar Singh's case (supra)** squarely covers his case for acquittal.

Although the aforesaid flaw can be said to be enough for discarding the case of the prosecution in its entirety, yet I feel that the case of the prosecution is stumbling on link evidence also. The admitted possession is that FSL Form No.29 was neither prepared at the spot nor deposited with the concerned police official who was Incharge of Malkhana. There is no evidence even to the effect that sample impression chit was also prepared at the spot. DSP Rajinder Singh had used his seal bearing impression 'RS' on the entire case property. He stated that he kept his seal with him. The case property was not produced by the Investigating Officer, before the SHO. On Form No.29 one small chit bearing impression 'RS' is affixed in the column 'Remarks'. It is not initialled by DSP Rajinder Singh. He in

his substantive statement does not say a word about the preparation of the sample impression chit. Who affixed that small chit on Form No.29, is an ambiguity which prosecution was to clear. The same is not done. For reference I have encircled that portion in the column of 'Remarks' on Form 29 with my black pen and initialled the same while dictating the judgment. No doubt ASI Sucha Singh (PW5) in his examination says that a specimen seal was prepared but his statement cannot override the statement of Rajinder Singh DSP whose seal was in fact used for sealing the case property. S.I. Harjinder Singh is also silent on this aspect. In order to overcome this weakness, S.I. Harjinder Singh when stepped into the witness box stated that he had produced the case property before the Ilaqa Magistrate alongwith the accused and the Ilaqa Magistrate checked the same and signed it as token of its correctness. This, in fact, is not factually correct. No doubt, the case property was produced before the Ilaqa Magistrate on 10.5.1996 but the learned Ilaqa Magistrate simply returned the case property after finding the seals intact. He did not put his initials on the case property so as to infer that the same could not be tampered with at any stage. It was simply ordered to be returned to Harjinder Singh, the Investigating Officer. Finding such type of flaws in the investigation in many cases this Court in **Bhola Singh's case (supra)** has laid the stress that it is incumbent upon the Investigating Officer to prepare Form No.29 at the spot and the same

be deposited in the Malkhana for the purpose of sending it to the Chemical Examiner alongwith the case property. In addition to it, in my view, if Form No.29 is produced before the Ilaqa Magistrate alongwith the case property, the Magistrate concerned after verifying all the investigation can put his initials on the case property and in the column of 'Remarks' also. This would remove all the doubts in the investigation. The present case is failing on this aspect.

Since on the basis of the aforesaid discussion, I am holding that the case of the prosecution is doubtful qua the appellant, I do not feel the necessity of touching the other aspects pointed out by Mr. Navdeep Singh, learned counsel for the appellant.

The net result is that the instant appeal succeeds. The conviction and sentence of the appellant as recorded by the learned trial Court is set aside. He is acquitted of the charge framed against him.

The appellant is stated to be in custody and shall be released forthwith.

(Virender Singh)
Judge

February 21, 2007.
'rana'